No. 80498-2

SANDERS, J. (dissenting)—The trial court convicted David T. Fair of a sexually violent offense on September 27, 1988, but then suspended his sentence under a special sex offender sentencing alternative,[1] conditionally releasing him to community supervision on February 15, 1989. After living nine months in the community Fair was arrested for robbery and reincarcerated on November 15, 1989. Years after Fair completed his sentence for the sex offense—but while he was still incarcerated for robbery—the State petitioned to commit him as a sexually violent predator (SVP).[2] When the State filed this petition, it did not allege Fair had committed a "recent overt act." However the State must allege and prove a recent overt act under these facts to satisfy the plain language of former RCW 71.09.030 (2008) and *In re Detention of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002).

Former RCW 71.09.030 is plain on its face:

> When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total

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[1] *See former* RCW 9.94A.120(7) (1988), recodified to RCW 9.94A.670 in 2000. *See* Laws of 2000, ch. 28, §§ 5, 20.

[2] The Department of Corrections calculated August 30, 2000 as Fair's release date for the sex offense and June 28, 2004 as the release date for the robbery. Clerk's Papers at 52, 56. The State filed its petition on June 25, 2004 during Fair's robbery incarceration.

> confinement on, before, or after July 1, 1990; . . . or (5) a person who at *any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act*; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

(Emphasis added.)[3] Fair fits within the plain text of this statute because the court previously released him from total confinement after his sex offense but before the State filed its petition. He was convicted in September 1988, was released from total confinement in February 1989, and was then reincarcerated for robbery—nine-months later—in November 1989. On June 23, 2004 the State filed its SVP petition shortly before Fair's release date for the robbery—long after he had completed his other sentence. Under the plain language of the statute, therefore, the State has an obligation to allege and prove a recent overt act—which it did not. Statutes such as this, which curtail civil liberties, are strictly construed so as not to expand their scope beyond that minimally required by the language itself. *In re Det. of Martin*, 163

[3] The concurrence challenges this opinion for relying exclusively on former RCW 71.09.030 while "ignor[ing] the other statutory language and our case law." Concurrence at 1. Instead, it relies on former RCW 71.090.060(1) (2008) to argue Fair was incarcerated so therefore the State does not have to prove a recent overt act. If Fair had been continuously incarcerated since his last sex offense, the concurrence would be correct; however here he had been released for nine months and had ample opportunity to commit a recent overt act, and therefore former RCW 71.09.030 controls.

Wn.2d 501, 508, 182 P.3d 951 (2008); *In re Det. of J.R.*, 80 Wn. App. 947, 956, 912 P.2d 1062 (1996); *In re Det. of Swanson*, 115 Wn.2d 21, 31, 804 P.2d 1 (1990); *Dunner v. McLaughlin*, 100 Wn.2d 832, 850, 676 P.2d 444 (1984); *In re Det. of Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983). Therefore, application of the plain language of the statute should end the case.

Notwithstanding the plain statutory text, the lead opinion relies upon *In re Detention of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000), to argue the State need not allege or prove a recent overt act. *See* lead opinion at 9; concurrence at 1. But *Albrecht* holds otherwise. 147 Wn.2d at 3. *Albrecht* held the State *must* prove a recent overt act to commit an individual previously released from total confinement into the community:

> We are asked to determine whether the State must allege a recent overt act in order to commit an offender as a sexually violent predator when the offender has been released from total confinement into the community and then returned to total confinement. We conclude that after a person has been released into the community, due process would be subverted by failing to require proof of a recent overt act.

*Id.* *Albrecht* controls this case because the legal issues and procedural postures are virtually identical. Albrecht, like Fair, was convicted of a sexually violent offense and then released from total confinement into community placement. After 30 days in the community Albrecht was rearrested for violating conditions of community placement by allegedly offering two boys 50 cents to follow him. This court concluded

Albrecht's violation did not qualify as a recent overt act, which the State had to prove in order to commit him.

In *Albrecht* we relied upon former RCW 71.09.030(5) as well as the due process clause of the Fourteenth Amendment to the United States Constitution to mandate this result:

> While due process does not require that the absurd be done, once the offender is released into the community, as Albrecht was, due process requires a showing of current dangerousness. *Foucha*[ *v. Louisiana*], 504 U.S.[ 71,] 80[, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)]. This conclusion is supported by the plain meaning of the statute. *See* RCW 71.09.030(5), which permits the State to file a sexually violent predator petition where "a person who at any time previously has been convicted of a sexually violent offense *and has since been released from total confinement and has committed a recent overt act*."

*Albrecht*, 147 Wn.2d at 10.[4] The lead opinion relies on *Henrickson* yet *Albrecht* distinguished the cases:

> Our opinion speaks only to the limited situation where the State files a sexual predator petition on an offender (1) who has been released from confinement (2) but is incarcerated the day the petition is filed (3) on a charge that does not constitute a recent overt act.

[4] I agree with the concurrence that under some circumstances a prisoner may have the opportunity to commit a recent overt act while confined and that due process requires said proof in that instance. *Henrickson*, 140 Wn.2d at 702 n.5 (Sanders, J., dissenting) (citing Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. Sex Res. 67, 67 (1996) (anonymous survey of prisoners revealed 20 percent had been forced or pressured to have sexual contact against their will while incarcerated)). That argument, however, did not carry the day in *In re Personal Restraint of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993). Perhaps that is an issue we should revisit.

*Id*. at 11 n.11. That is precisely the situation here.

Having said this, I concede the lead opinion's point that Fair's release from custody and subsequent reincarceration was more recent in *Albrecht* than here. Lead op. at 10, 11. However that is a difference without a distinction.

First, Fair fits within the literal language of former RCW 71.09.030(5) just as much as Albrecht did. The statute does not require any temporal relationship between when the individual is released from confinement and when the State files its petition; it only requires the release precede the filing.

Second, this makes sense. The lead opinion's claim that a more remote release date "would not be recent or current evidence of his present dangerousness," lead op. at 11, misses the point of this statute: requiring that the State offer evidence to justify severely depriving someone's liberty interest, concurrence at 4 (citing *In re Detention of Young*, 122 Wn.2d 1, 40-41, 857 P.2d 989 (1993)).[5]

If Fair was not a sex predator during his nine months in the community—no matter how long ago that was—there is still no such evidence he is one today. The State improperly based its petition on Fair's conduct before his nine-month release in 1989. Fair committed no recent overt act while he was in the community for nine

[5] Our statute codified *Young*, 121 Wn.2d at 41, which required that the State prove a recent overt act to incarcerate "a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement." Former RCW 71.09.030.

months and has committed no overt act since. The lead opinion disregards the theoretical purpose of the statute: treatment and incapacitation of those allegedly incapable of controlling their behavior. The lead opinion ignores the legislative finding that the alleged condition is "very long term." RCW 71.09.010. The concurrence properly concludes the overt act requirement was designed to ensure "the mental illness [is] real and current enough to justify the deprivation of liberty" but forgets—like the lead opinion—the most important point: Fair did not commit an overt while free in the community for nine months. Concurrence at 4 (discussing how *Young* relies on *People v. Martin*, 107 Cal. App. 3d 714, 165 Cal. Rptr. 773 (1980) to hold State must prove a recent overt act).[6]

Indeed, Fair's release from confinement to nine months in the community may not have been "recent," but it stands the due process clause on its head not to require proof of an overt act that is at least as recent as the last opportunity to reoffend. U.S. Const. amend. XIV, § 1. This court should reverse the Court of Appeals for improperly allowing the State to commit Fair without alleging and proving a recent

[6] Instead, the concurrence argues the State never has to prove an overt act to commit an incarcerated person, unless the person "had adequate opportunity while being incarcerated to commit a recent overt act but did not . . . ." Concurrence at 6. This proposed burden of proof is illusory since we have held those incarcerated have no opportunity to commit a recent overt act while imprisoned, but "[w]hen an individual has been in the community, the State has the opportunity to prove dangerousness through evidence of a recent overt act." *Young*, 122 Wn.2d at 41.

overt act.

Accordingly I disagree with the lead opinion and its concurrence.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Tom Chambers, result only